Partner has a thirty-day window for making a distribution to a withdrawing partner, the purpose of which is to allow the hedge fund to assemble the selected assets for distribution. They assert that hedge funds cannot distribute assets immediately because, for example, they invest in illiquid securities or hold short positions. According to Defendants, the withdrawing partners bear the risk that the selected assets could decline in value between the date of withdrawal and the date of the distribution, a risk those partners could hedge if they deem it advisable.

Plaintiffs, citing Article X of the LPA, assert they were entitled to assets whose "value" on the initial distribution date equaled at least 90% of their estimated pro rata share of the total value of the fund as of December 31, 2006, the date of withdrawal.22 According to Plaintiffs, the purpose of the LPA's termination provisions is to permit a limited partner to terminate her involvement with the limited partnership. As of the withdrawal date, the limited partner is no longer part of the partnership, and is entitled to receive distribution of its share of the partnership as of that date - a value that is constant and no longer subject to the vagaries of the markets. In contrast to Defendants' position, Plaintiffs assert that the partnership, not the withdrawing partners, bears the market risk, and could engage in allocation of risk strategies such as converting positions to cash or hedging. Plaintiffs concede the LPA permits Penfield to arrange its affairs, but argue the partnership must redeem the obligation owed the limited partner as a creditor.

Plaintiffs further acknowledge that under the LPA, the General Partner is free to distribute cash, securities, or a combination, but contend the amount due the withdrawing limited partner must be determined as of the withdrawal date. Each limited partner had a Capital Account as of December 31, 2006 measured in dollars, not an account containing specified securities. As of the withdrawal date, the limited partner became a creditor for that same amount of money. The LPA distinguishes between the date of withdrawal and the date of payment. Here, the withdrawal date was December 31, 2006; the LPA provides for determining a withdrawing partner's Liquidating Share by reference to its Capital Account as of that date. According to Plaintiffs, the calculation of the Liquidating Share is formulaic and a withdrawing partner is entitled to that fixed, economic value.

As additional contractual support for their position, Plaintiffs note an obligation exists to pay interest on any unpaid balance for the period from the withdrawal date to the date of payment. Plaintiffs assert the principal amount

22 As additional support, Plaintiffs cite to DRULPA § 17-606, discussed earlier, for the proposition that statutorily, as a withdrawing partner, they gained the status of a creditor as of the date of withdrawal.
to be used in the interest calculation is fixed, and is determined with reference to the Liquidating Share. In the case of a limited partner withdrawing at least 90% of her Capital Account, the LPA defines her Liquidating Share as the Capital Account of such partner on the date of her withdrawal. Defendants' interpretation would look to the specific assets the General Partner selected for transfer to the withdrawing partners' accounts on or around the withdrawal date. Plaintiffs assert Defendants' view would lead to the conclusion that the principal is always in flux, a nonsensical result.

On Defendants' motion to dismiss, the issue is whether Plaintiffs conceivably could succeed in proving their construction of the LPA is correct. Plaintiffs assert the distribution procedure involves calculating an estimated Liquidating Share on December 31, 2006 for purposes of the initial distribution within thirty days and the remaining actual amount due at a later date, after any adjustments based on the audit of the partnership, plus interest. Although the parties agree that Plaintiffs were entitled to receive securities having a value of $63,610,725 as of the date of withdrawal, Defendants construe their obligations under the LPA differently. They contend that after calculating the amount of the Liquidating Shares, the General Partner could, in its sole discretion, determine to distribute that entire amount in kind and effectively segregate for the Plaintiffs' individual accounts on December 31, 2006 or as soon thereafter as reasonably practicable specifically selected securities having a value equal to the Liquidating Share. Then within thirty

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21See LPA § 10.01.
22The latter aspect of Plaintiffs' argument regarding the handling of interest calculations does not withstand scrutiny. In terms of the initial distribution required to be made within thirty days of the date of withdrawal, the parties appear to agree on the interest calculation. There is no dispute the Liquidating Shares of the Plaintiffs, the withdrawing limited partners who directed Penfield to transfer all or a substantial portion of their investment to Emerald, was $71,103,538, and that Plaintiffs directed that $63,610,725 of those distributions be transferred to Emerald. Compl. ¶¶ 9, 25; Tr. at 52. All parties agree that from December 31, 2006 until the initial distribution on January 17, 2007, interest accrued on that principal amount. Tr. at 53-54. According to Plaintiffs, the in kind distribution of 90% or more of the $63,610,725 principal amount they received on January 17 should have been valued as of that date, and they would be entitled to interest on the remainder from that date until the date Penfield distributed the unpaid balance. The only respect in which Defendants disagree is that they valued the securities distributed on January 17 as of December 31, 2006. The Complaint alleges this caused Defendants to claim an inflated payment: Defendants apparently claim they distributed securities worth $58,631,876 on January 17, 2006, while Plaintiffs contend the amount was only $58,445,309. See Compl. ¶¶ 27, 37. Defendants' methodology would reduce the amount of the unpaid balance and thereby also lower the amount of interest, as well. Whichever interpretation of the LPA prevails, however, the principal amount subject to interest would not fluctuate, as Plaintiffs posited.
23Plaintiffs did not cross move for summary judgment or judgment on the pleadings on this issue.
24Tr. at 53.
days, the General Partner would be obligated, according to Defendants, to distribute to the withdrawing limited partners at least 90% of those securities without regard to their value on the date of distribution. In fact, Pine Creek allegedly proceeded in that manner. The issue before me on the motion to dismiss as to count one is whether Plaintiffs conceivably could prove their claim that Defendants' construction of the LPA is wrong and their implementation of that erroneous construction subjects Penfield to liability for breach of contract. I answer that question in the affirmative.

Under the LPA § 8.02(c), a partner who withdraws at least 90% of its capital account shall be deemed to have retired as of the withdrawal date. Section 8.02(a) provides that a limited partner may withdraw all or any of its capital account as of June 30 or December 31 upon giving at least fifteen days prior notice of their intent to withdraw. Here, Schuss and the other Plaintiffs provided the requisite notice and withdrew all of their capital accounts from Penfield as of December 31, 2006. Thus, they are deemed to have retired.

After such a constructive retirement, the General Partner's contractual obligation shifts to Article X. Under LPA § 10.01, the General Partner is to cause payments to be made to the fully withdrawing limited partner. Section 10.01 provides: "Within 30 days after the date of retirement of a Partner . . . there shall be paid or distributed to such Partner . . . an amount in cash or, . . . in securities . . ." or in some combination "equal in value to not less than 90% of the estimated amount of the Liquidating Share . . . ."

In construing the LPA, Plaintiffs have at least a colorable argument that the plain language of the LPA supports their interpretation of the Partnership Agreement. The LPA arguably draws a distinction between the date of withdrawal or retirement and the date of distribution. The amount of the Liquidating Share is determined as of the date of withdrawal; the General Partner must make an initial distribution of at least 90% of some reference value within thirty days of the date of withdrawal. Plaintiffs argue that reference value is the Liquidating Share of the limited partnership. Defendants apparently contend the reference value could be based on the number of shares of various securities the General Partner allocated to the withdrawing limited partners as of the date of withdrawal. At this preliminary stage, I cannot rule out the possibility that Plaintiffs' construction is correct. Indeed, it seems quite reasonable. Thus, the Court denies this aspect of Defendants' motion to dismiss count one.27

27Plaintiffs' breach of contract claim based on the untimeliness of Penfield's performance obligations regarding distribution is closely tied to its complaint about the manner in which Defendants effected the distributions. I therefore deny that aspect of the motion to dismiss count one for the same reasons.
C. Breach of Fiduciary Duty Against Pine Creek and Witter

Plaintiffs' second cause of action is for breach of fiduciary duty against Pine Creek and Witter. The Complaint avers that Pine Creek and Witter breached their fiduciary duties by: (a) violating Delaware law by distributing in kind assets to Plaintiffs in excess of their pro rata share; (b) shifting losses to Plaintiffs by distributing depreciated securities and valuing them based on inflated year-end prices; and (c) unreasonably delaying the final distribution to Plaintiffs in order to leverage them to accept less than their full Liquidating Shares. Further, the Complaint states that Witter, as general partner of Pine Creek, caused Penfield to breach its fiduciary duty, violate Delaware law, and commit acts of bad faith and gross negligence against Plaintiffs. Based on my conclusion as to Plaintiffs' first count that Defendants were not required to make any in kind distribution ratably, the portion of their second count premised solely on Defendants' failure to make a ratable in kind distribution lacks merit.

Defendants argue Pine Creek, as General Partner, could not have breached its fiduciary duty to the withdrawing limited partners, and Witter could not have aided and abetted such a breach, because Pine Creek and Witter complied with the LPA in making the distribution. Defendants further contend that, in any event, they are exculpated from liability under § 3.03 of the Partnership Agreement. Lastly, Defendants urge the Court to dismiss the breach of fiduciary duty claim as merely duplicative of Plaintiffs' breach of contract claim.

The analysis of those defenses necessarily begins with an evaluation of the reasonableness of Defendants' interpretation of the LPA as it relates to the required distribution. Defendants assert that because they made the distributions in compliance with the LPA, Pine Creek and Witter could not have breached their fiduciary duties. Unlike Plaintiffs' interpretation of the Partnership Agreement as it relates to distributions discussed previously, however, Defendants' interpretation is not closely tied to the language of the LPA. Defendants contend the LPA vests the General Partner with the discretion to select securities at the time of retirement, value those securities as of that date, and subsequently distribute them to the withdrawing limited partners, without regard to whether those securities had increased or decreased in value as of the date of the distribution.

While the LPA expressly provides the General Partner with discretion to select which, if any, securities to include in a distribution, the LPA does not explicitly support the remainder of Defendants' position. Rather, the LPA requires the General Partner to cause the partnership to make a distribution in two phases, with the first phase being at least 90% of the withdrawing partner's estimated Liquidating Share. Although the Court is not required to
decide this issue for purposes of the pending motion to dismiss, Defendants' interpretation of the LPA to permit them to use the securities they selected and valued at the time of retirement as a proxy for the Liquidating Share appears strained. When the surrounding facts are developed, the Court may reach a different conclusion. On the preliminary record now before me, however, I cannot rule out the possibility that Plaintiffs might succeed in proving Defendants' interpretation is incorrect and, perhaps, even glaringly so.

Defendants also seek dismissal of the second count based on the LPA's exculpation clause. Under Delaware law, a partnership agreement may limit or eliminate any and all liabilities of a partner or other person to a limited partnership or to another partner for breach of contract and breach of duties, provided the agreement does not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing. Here, LPA § 3.03 exculpates the General Partner for losses arising out of "any act or activity undertaken . . . in fulfillment of any obligation or responsibility under this Agreement." Although this is a broad exculpation clause, the limitation of liability, by its terms, does not cover gross negligence, willful misconduct, or violation of applicable laws.

In this case, because the method Defendants used to determine the amounts due to be distributed to Plaintiffs arguably violates the LPA, reflects an unreasonable interpretation of the partnership agreement, and has caused significant damage to Plaintiffs to the benefit of Defendants and those affiliated with them, among others, Plaintiffs conceivably could prove Defendants adopted their interpretation in bad faith or as a result of gross negligence or willful misconduct. Thus, at least those exceptions to Defendants' potential grounds for exculpation might apply here. Thus, Defendants' exculpation defense is not sufficient to support dismissing Plaintiffs' claim for breach of fiduciary duty as a matter of law.

As an independent basis for dismissing count two, Defendants point to cases in which this court has dismissed breach of fiduciary duty claims that arise out of the same facts as claims for breach of contract. Here, Plaintiffs'

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26 Del. C. § 17-1101(f) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

27 LPA § 3.03(a).

breach of fiduciary duty claim derives from the allegation that the General Partner violated the LPA when it made distributions of depreciated securities at inflated year-end prices, and then unreasonably delayed the final portion of such distributions to Plaintiffs, while providing more favorable treatment to persons or entities related to Defendants. Although these fiduciary duty claims share a common nucleus of operative facts with Plaintiffs' breach of contract claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy. For example, in the breach of contract claim Plaintiffs allege Penfield breached the LPA by not distributing to Plaintiffs the full amount due. By contrast, in the breach of fiduciary duty claims Plaintiffs allege Pine Creek, at the direction of Witter, engaged in intentional misconduct, such as dumping 2007 losses on Plaintiffs, to enrich Penfield's remaining investors, consisting mainly of Pine Creek, Witter, and members of the Witter family, at the expense of Plaintiffs. Hence, this case is distinguishable from those Defendants rely on, which dismissed breach of fiduciary duty claims as duplicative of breach of contract claims that either were substantially identical, such that the fiduciary duty claim would have been "superfluous," or involved remedies that were likely to be equivalent, based in part on the company's reassurance that it had sufficient resources to allow for a full remedy. The latter consideration is relevant in this case, because approximately 94% of the funds invested in Penfield were withdrawn and the amounts at issue are significant.

For all of these reasons, I deny Defendants' motion to dismiss the Complaint's second cause of action against Pine Creek and Witter for breach of fiduciary duties.

D. Accounting Against Penfield

Plaintiffs' third cause of action is for an equitable accounting. Plaintiffs allege that an accounting is necessary to achieve a complete settlement of Penfield's affairs.

An action for an accounting is not available when there exists an adequate remedy at law. Although Defendants contend an adequate legal remedy exists here in the form of money damages, I believe the situation is likely to be more complicated than that. Approximately 94% of Penfield's limited partners withdrew as of December 31, 2006, causing the distribution of the vast majority of its assets. The Complaint alleges that Penfield and the

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31 Gale, 1998 WL 118022, at *5.
32 Blue Chip, 906 A.2d at 834.
other Defendants distributed cash and other partnership assets to relatives of the principals of Defendant Witter under questionable circumstances both at the time of the withdrawals and more recently. Thus, while Plaintiffs ultimately may show that are entitled to receive the difference between their full actual Liquidating Share value and what they, in fact, received, plus interest, determining how that amount equitably might be satisfied from Penfield's current assets or otherwise may be complicated. Therefore, there may not be an adequate remedy available at law.

Further, courts historically have viewed a number of factors when considering a demand for an accounting. Those factors include whether: (1) the partner was wrongfully excluded from the partnership; (2) there is a breach of fiduciary duty; and (3) other circumstances render an accounting just and reasonable.\(^34\) Here, Plaintiffs voluntarily withdrew from Penfield, but the Complaint alleges Defendants violated Plaintiffs' rights as withdrawing limited partners. Additionally, as previously discussed, Plaintiffs have asserted colorable claims for breach of fiduciary duty against Penfield's General Partner and its general partner. Based on the complexity of the allegations regarding improper distributions and the nature of the wrongs alleged, I cannot at this preliminary stage exclude the possibility that an accounting will provide an appropriate form of relief. Accordingly, Defendants' motion to dismiss count three is denied.

IV. CONCLUSION

For the reasons stated, Defendants' motion to dismiss is granted in part and denied in part.

IT IS SO ORDERED.

SUTHERLAND v. SUTHERLAND

Court of Chancery of the State of Delaware, New Castle

No. 2399-VCL

May 29, 2008

J. Travis Laster, Esquire, and Matthew F. Davis, Esquire, of Abrams & Laster, LLP, Wilmington, Delaware; and Bonita L. Stone, Esquire, and Stewart T. Kusper, Esquire, of Katten Muchin Rosenman LLP, Chicago, Illinois, of counsel, for plaintiff.

Robert S. Saunders, Esquire, of Skadden Arps Slate Meagher & Flom, LLP, Wilmington, Delaware, for individual defendants.

A. Gilchrist Sparks, III, Esquire, S. Mark Hurd, Esquire, and Jay N. Moffitt, Esquire, of Morris Nichols Arsh & Tunnell, LLP, Wilmington, Delaware, for nominal defendants.

LAMB, Vice Chancellor

The nominal defendants, Dardanelle Timber Co., Inc. and its wholly owned subsidiary, Sutherland Lumber Southwest, Inc., move pursuant to Court of Chancery Rule 59(f) to reargue this court's May 5, 2008 denial of their motion to dismiss this derivative action based on the conclusions of a one-person special litigation committee ("SLC"). The companies argue that the court both misapplied the law and misapprehended material facts in reaching its decision. For the reasons stated below, the motion for reargument will be denied.

I.

The standard applicable to a motion for reargument is well settled. To succeed, "'the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law.'"1 Such motions "are not a mechanism for litigants to relitigate claims

already considered by the court." Rather, "Rule 59 relief is available to prevent injustice . . . ." Further, any actual misunderstanding or misapplication must be such that "the outcome of the decision would be affected."

II.

The companies' lead argument in support of their motion for reargument is that the court misapplied the law by employing a higher standard of review than that articulated in Zapata Corporation v. Maldonado\(^5\) to evaluate the SLC's investigation and conclusions. According to the companies, this heightened standard of review is evident in the court's passing reference to the facts that Dardanelle is closely held and that the plaintiff, Martha Sutherland, claims to speak for 50% of its common stockholders. This argument plainly misconstrues the court's opinion. As set forth in the Memorandum Opinion, when a motion to dismiss is based on the findings of a Zapata special litigation committee, the moving party must shoulder a burden akin to summary judgment:

The SLC is not entitled to any presumptions of independence, good faith, or reasonableness. Rather, the corporation has the burden of proof under Rule 56 standards, which require the corporation to establish the absence of any material issue of fact and its entitlement to relief as a matter of law. In addition, as the court in Kaplan v. Wyatt noted, the motion must be supported by a thorough record. It seems . . . that what the Committee did or did not do, and the actual existence of the documents and the persons purportedly examined by it, should constitute the factual record on which the decision as to the independence and good faith of the Committee, and the adequacy of its investigation in light of the derivative charges made, must be based. Each side has the opportunity to make a record on the motion. If the court is satisfied with the SLC's independence and good faith, and the


\(^3\)Am. Legacy Found., 895 A.2d at 877; In re ML/EQ, 2000 WL 364188, at *1.


\(^5\)430 A.2d 779 (Del. 1981).
Moreover, in a case involving a one-person SLC, the moving party must prove that the SLC was "like Caesar's wife... above reproach." This rubric applies most obviously to the issue of the SLC's independence, but it is simple common sense that the same cautious approach should animate the court's evaluation of the good faith and reasonableness of a one-person SLC's investigation, and the reasonableness of its conclusions.

In the Memorandum Opinion, the court concluded that the companies failed to carry their burden of showing that no material issue of fact existed regarding the good faith or reasonableness of the SLC's investigation into the claims alleged in the complaint. In reaching this result, the court simply applied established principles of Delaware law and did not apply any improperly heightened test. The closely held nature of Dardanelle's share ownership was mentioned merely for emphasis.

The companies next argue that the opinion misconstrued the facts when it criticized the SLC's admittedly intentional decision to omit from its report any reference to two large payments the companies made in 1999 and 2000 to Leo King for the benefit of the individual defendant Perry Sutherland. The SLC's report fails to mention these payments even though they represented the very sort of suspected activity that motivated Martha Sutherland to file the complaint and were the largest identified payments by the companies to any of the individual defendants, or on their behalf. According to the companies, the court should have considered evidence and argument to the effect that the SLC omitted reference to these payments only because the SLC determined that any claims relating to these payments were subject to a strong statute of limitations defense. The companies go so far as to argue that, by purportedly ignoring this evidence and argument, the opinion improperly "impugn[ed] the good faith of an independent director of a Delaware corporation and independent Delaware counsel."

These criticisms are far off the mark. Not only did the SLC neglect to mention the King payments, it worded its report in such a way as to convey the

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7Lewis v. Fuqua, 502 A.2d 962, 967 (Del. Ch. 1985).

8See In re Oracle Corp. Deriv. Litig., 824 A.2d 917, 940 (Del. Ch. 2003) (stating "the composition and conduct of a special litigation committee therefore must be such as to instill confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity").

9Defs.' Br. 4.
impression that there were no such payments. As Martha points out in her opposition to this motion, the SLC implied in its report that the only benefit Perry received relative to work on his residence was the availability of a discount on construction supplies generally available to all members of the Sutherland family.\textsuperscript{10} Indeed, neither the court nor Martha would have ever known about these payments from the report itself or the limited discovery the SLC voluntarily made to Martha. Rather, it was only after Martha won a hard-fought motion to compel that she gained access to documents evidencing these payments.

It is inadequate to suggest that the omission of this information from the report was justified by the SLC's unspoken conclusion that there was a strong statute of limitations defense to any claims that might arise from these payments. On the contrary, a good faith effort to deal with the King payments issue necessarily required that the report both disclose the facts relating to the payments and present the analysis of Perry's defense. The SLC's failure to do so plainly prevented the court from concluding that the moving parties carried their burden of showing that this one-person SLC acted reasonably and in good faith.

As the court noted in its opinion, the additional fact that the SLC destroyed its original interview notes, after using them to prepare cursory and incomplete summaries of the interviews it conducted, further undermined the court's confidence in the good faith and reasonableness of the SLC's investigation. To put it simply, the touchstone of good faith in the context of a special litigation committee report is its demonstrated willingness to deal openly and honestly with all relevant and material information. Where, instead, the record shows that material information is consciously omitted from both the report and the investigative record on which it purports to rest, the court must wonder what other information was omitted or what other information might have been uncovered by a more diligent inquiry.

The companies next argue that the court's holding that the SLC's review of the general ledgers was unreasonable must be based on some misapprehension that the SLC agreed to conduct a forensic investigation of the general ledgers. The companies argue that such a forensic investigation would be unreasonable under Zapata, "especially where specific allegations as to personal expenses had proved to be demonstrably false."\textsuperscript{11}

\textsuperscript{10}Report at 118.

\textsuperscript{11}Defs.' Br. 6. The companies also contend that the court misapprehended a material fact by ignoring the SLC's conclusion that Sutherland Lumber Company, not Maysville, invoiced Dardanelle for Perry's and Todd's use of the facilities, and that Dardanelle included these amounts in Perry's and Todd's W-2s after paying the invoices. These facts do not alter the court's analysis.
As an initial matter, the court never suggested a forensic investigation was required. However, the SLC was required to investigate the claims in the case, not merely the specific allegations Martha made in her complaint. "Centrally, the complaint alleges that the individual defendants have used the companies' corporate funds and assets for personal benefit." For this court to find that the SLC conducted a reasonable investigation into all of the claims alleged in the complaint, and for the SLC to properly point to its investigation of the ledgers as evidence of the reasonableness and thoroughness of its investigation of the complaint's claims, the SLC ought to have conducted a review of the ledgers in a manner designed to identify payments from the companies to third parties on behalf of the individual defendants. Instead, as the SLC's member admitted in his deposition, the SLC's review of the ledgers would have failed to capture even the two large payments made to King on Perry's behalf. In short, the SLC's review of the general ledgers did nothing to help the moving parties meet their burden under Zapata.

III.

For the reasons stated above, the nominal defendants' motion for reargument is DENIED. Each party shall bear its own costs.

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First, aside from representations the SLC made in its report that are unsupported by any documents, the record is devoid of information as to how the SLC determined that all of the payments were included in Perry's and Todd's W-2s. Second, it remains true that the SLC's review of the companies' general ledgers would have missed payments made to third parties on Perry's behalf, including payments to Sutherland Lumber Company (whether or not later included in W-2s), to Perry's credit card issuers, and, most notably, to King. This fact contributed to the court's inability to conclude that the companies bore their burden of proof as to the reasonableness of the SLC's investigation of the ledgers.


13 Sutherland, 2008 WL 1932374, at *2 (citing Compl. ¶ 98).

14 Report at 121.
VENHILL LIMITED PARTNERSHIP v. HILLMAN

No. 1866-VCS

Court of Chancery of the State of Delaware, New Castle

June 3, 2008


David E. Wilks, Esquire, and Thad J. Bracegirdle, Esquire, of Reed Smith LLP, Wilmington, Delaware; and Mark L. Tamburri, Esquire, of Reed Smith LLP, Philadelphia, Pennsylvania, of counsel, for defendants.

STRINE, Vice Chancellor

I. Introduction

This case underscores the reality that it is not only greed that can inspire disloyal behavior by a business fiduciary. In fact, when a business fiduciary lives a plush and comfortable life, derived from substantial distributions from family trusts, he can afford to place other considerations — such as the achievement of a personal dream, a desire to prove himself as an entrepreneur and to call himself a CEO, or a stubborn refusal to admit failure — ahead of the prudent pursuit of maximum profit, having a silk-sheeted safety net to fall back upon. In this case, that is just what happened. Defendant Howard Hillman had many years to make Auto-Trol Technology Corporation a success, with the support of substantial investments from trusts benefiting himself and his brother, and their families. At one stage, Auto-Trol had grown its revenues to nearly $80 million a year and was a publicly listed company.

But its fortune declined rapidly in the early 1990's, until such time as its stock was delisted, its revenues fell to less than $7 million a year, it became consistently and hugely unprofitable, and it had to go private when its equity...
had turned into a speculative penny stock. By the late 1990s, Howard Hillman's fellow trustees of key family trusts began to object strenuously to further investments in Auto-Trol, an investment in which the family trusts had poured over $48 million by 1999. As early as 1996, those trustees told Hillman that they opposed further investment flows into Auto-Trol.

But the trustees did not have direct control over that issue. In 1984, the trusts had formed and funded a limited partnership, Venhill Limited Partnership, to make investments using funds down-streamed from the trusts for that purpose. Howard Hillman was the sole general partner of Venhill and had sole discretion to make investment decisions on its behalf. Even though the trustees told Hillman that they opposed further investments from Venhill into Auto-Trol, Hillman told them he would continue to fund Auto-Trol. The cash drain of funds flowing from Venhill to Auto-Trol was so great that, under Hillman's control, Venhill needed substantial inflows of capital from its limited partner trusts to meet funding calls for its other private equity and venture capital investments. Despite their stance on loans to Auto-Trol, the trustees continued to fund Venhill with cash from the trusts until December of 1999, knowing full well that Howard would "invest" those funds in Auto-Trol.

Thus, from 1999 to July of 2005, Hillman put another $37 million into Auto-Trol. He did so on terms that were set entirely by himself and that were far more favorable than Auto-Trol could have ever received in arms-length transactions. That is not surprising as Auto-Trol was insolvent and its shrunken revenues did not cover its substantial expenses. To make Auto-Trol appear solvent, Hillman re-characterized debt Auto-Trol owed to Venhill as equity. He also rolled $31.5 million in various short-term notes that would come due within three years into a single note maturing in 2020 that would only require interest payments "from time to time." That note reflected his regular practice since 2002 of loaning Venhill funds to Auto-Trol that earned interest at the Applicable Federal Rate, a floating rate set by the federal government available only to the highest quality borrowers. Auto-Trol was a borrower who, by Hillman's own admission, could not obtain debt or equity financing on any terms in the market. In total, Hillman made some 186 loans from Venhill to Auto-Trol. Venhill received very little in return, and had invested $85.4 million at a substantial loss by July of 2005.

At the end of their tolerance, the other trustees of the family trust — Hillman's brother and cousin — finally took action to use the trusts' voting power of Venhill's equity to remove Hillman as general partner. Sensing that his removal was coming, one of Hillman's last acts as general partner was to transfer the majority equity interest of Auto-Trol from Venhill to an entity that Hillman personally controlled for no consideration. Hillman also funneled another $2 million from Venhill into Auto-Trol as he went out the door.
The inevitable litigation ensued. In this case, the issues have been narrowed. Until shortly after trial, Hillman clung to the untenable position that his actions in transferring control over Auto-Trol from Venhill to himself for nothing was proper. After trial, he abandoned that position and unwound that transaction. Similarly, going into trial, the plaintiffs — the trustees of the various trusts and the new general partner of Venhill on its behalf — sought monetary damages for actions taken by Hillman going back as early as 1993, even though Hillman's intention to continue putting funds into Auto-Trol was understood by all the trustees of the family trusts. On the first day of trial, the plaintiffs finally agreed to limit their request for relief to those actions taken by Hillman within three years of the filing of their complaint on December 30, 2005, abandoning their claims as to prior periods as time-barred.

At trial, the following became clear. From the beginning of the applicable time period in 2002 (and indeed much sooner) until Howard was removed as Venhill's general partner, Auto-Trol had no plan of business that, to the mind of a rational investor contemplating entrusting equity or debt capital to it, would have provided any rational prospect of success. Given the lack of any realistic plan for future success, and Auto-Trol's past record of business failure, rational private equity investors and lenders would likely not have invested in Auto-Trol on any terms. Absolutely certain is that such rational third-parties would not have lent money to Auto-Trol on terms that corporate borrowers with a AAA credit rating could not obtain. Even more than absolutely certain is that such rational third-parties would not have continued to pour money into Auto-Trol when the prior infusions had done nothing to help the corporation increase its chances for success.

The reason for Venhill's provision of financing to Auto-Trol was singular: Howard Hillman's personal sense of identity was bound up in Auto-Trol. He had served as its CEO since 1985, found its mission interesting, and fervently desired to make it a success, proving to himself and the world that he was capable of generating wealth as an entrepreneur and executive, and not simply by directing family funds into investments identified by another branch of his family, with which he had strained relations.

But Howard Hillman was not pursuing his Auto-Trol dream with his own funds. Instead, he was funding it with Venhill funds that did not belong to him. He was a fiduciary and expected to exercise a rational business judgment about how to invest Venhill's funds. He was expected to make investments that would maximize the returns to Venhill, not that would maximize the personal value he placed on remaining as CEO of Auto-Trol and seeking to make it a success. Likewise, Howard Hillman could not place his pride above his duty to Venhill. In that respect, it is clear that Hillman was loath to admit to his fellow trustees — his brother and cousin — that Auto-
Trol was failing and should be responsibly wound-up unless another financing source could be found.

Instead of exercising his authority as Venhill's general partner for the best interests of Venhill, Hillman irrationally pursued his own agenda by imprudently investing tens of millions of dollars in an insolvent company with no rational plan for future success. He made those investments on terms that were grossly unfair to Venhill, and without any attempt to compare what Venhill would likely receive from investing in Auto-Trol to what it could receive for making other market investments. In fact, it is indisputable that no rational third-party would have invested in Auto-Trol on the terms Hillman caused Venhill to invest. At most, a rational third party might have purchased Auto-Trol's assets for a sum certain, and took what could be salvaged going forward, leaving Auto-Trol's previous investors to enjoy only the modest dent the sales price would make in their huge losses. Put bluntly, Hillman knew he was imprudently investing Venhill's funds by pouring them into a sinking hole, when there were much safer investments available that promised a higher rate of return. Not only that, Hillman knew that he was imprudently concentrating Venhill's investments in Auto-Trol, increasing investments in Auto-Trol to a staggering 63% of Venhill's investments by 2005.

After careful consideration of his testimony and the relevant evidence, I am confident that Hillman knew that what he was doing was imprudent. But he believed that because of the overall wealth of the trusts and the work he had put in at Venhill that he had an entitlement to pursue his Auto-Trol dream with the funds of his family members. The more they raised concerns, the more stubborn and stuck-in he got regardless of the worsening situation at Auto-Trol, eventually engaging in an outrageous attempt to transfer control of Auto-Trol from Venhill to himself personally when it became clear that his ouster was imminent. In the course of doing that, Hillman caused Venhill to make one last large infusion of funds into Auto-Trol.

Having knowingly pursued his personal objectives over the best interests of Venhill, Hillman acted disloyally and is liable to Venhill for the harm he caused it. At the very least, his conduct was grossly negligent which also suffices to expose him to liability under the terms of Venhill's Limited Partnership Agreement. Finding that all the investments he caused Venhill to make into Auto-Trol from December 30, 2002 to July 26, 2005 were on terms he knew were imprudent and unfair to Venhill, I will require Hillman to repay the principal amount plus a rate of interest approximate to what Venhill would have earned had it used the funds for alternate investments.
II. Factual Background

A certain amount of Hillman family history is essential to a proper understanding of this case. Henry Hillman founded the successful investment firm known as The Hillman Company, which is now a private equity investor in many high technology companies.

Defendant Howard Hillman and his brother Tatnall Hillman joined Henry Hillman’s family when Henry married their mother, Dora. Henry became their stepfather and they took his surname. Henry Hillman had at least one child from his first marriage. The importance of that will become clear soon.

Howard Hillman is now seventy-three years old. He graduated from Princeton University, spent some time in the Navy, and went on to get an M.B.A. from Harvard Business School in 1960. In the early part of his career, he spent nine years as a commercial loan officer at Chemical Bank.

Howard’s brother, Tatnall, graduated from Princeton with a biology major, then spent four years as an active duty Naval officer. After that, he taught high school classes for several years in Princeton, New Jersey, and briefly worked as a computer programmer. Therefore, by the mid-1960s Howard was focused on a career in business, and Tatnall was trying to figure out to what career, if any, he should dedicate his time.

By that time, their stepfather Henry Hillman had died. Henry’s son, Henry Hillman, Jr., had taken over leadership of The Hillman Company after his father’s death and shares of The Hillman Company had been distributed to Hillman family members. In 1965, Henry, Jr., sought to consolidate ownership of The Hillman Company, and approached his relatives with offers to buy out their shares of The Hillman Company.

Howard thought the offer from his step-brother Henry was too low and declined to sell the shares to his step-brother. His mother, Dora, and brother, Tatnall, followed suit and also declined to sell their shares. Howard, Tatnall and Dora eventually reached an arrangement with Henry Hillman, Jr., and remained as owners of stock in The Hillman Company.

The joint action by Howard, Tatnall, and their mother Dora was not coincidental. As of that time, Howard and Tatnall had a deep brotherly bond, having been very close as children. Consistent with this relationship, on August 25, 1968, Howard and Tatnall’s mother, Dora Hillman, created an interlocking system of trusts primarily for the benefit of her sons Howard and
Tatnall Hillman and their families. The trusts were funded by stock in The Hillman Company.

Dora created the "A-1 Trust" for the benefit of Howard Hillman and his issue, and the "B-1 Trust" for the benefit of Tatnall Hillman and his issue. The "Trust Agreement" provided that the trusts would be administered by the same three "Trustees," two of whom would be Howard and Tatnall Hillman. The Trust Agreement provided the Trustees the power to establish accumulation trusts for the benefit of any beneficiary of the main Trust Agreement. Three days after Dora executed the Trust Agreement for the A-1 and B-1 Trusts, Howard and Tatnall created two additional series of trusts for the benefit of their respective children, the C-series of trusts for the benefit of Howard's children and the D-series of trusts for Tatnall's children. Additional accumulation trusts under the A, B, C, and D-series have been established over the years for the benefit of various beneficiaries. The value of the A-1 Trust's assets are now conservatively estimated in the neighborhood of $120 million, and the value of the B-1 Trust is slightly less because of more conservative investing.

A good deal of the value of the A-1 and B-1 Trusts results from the refusal of Howard, Tatnall, and Dora to go along with Henry, Jr.'s desire to buy them out of The Hillman Company stock. The A-1 and B-1 Trust now each contain around 13% of the stock of The Hillman Company, or around 26% of that Company's stock collectively. Howard considers his leadership in the decision not to sell in 1965 to be the primary reason the Trusts are so well funded, and this likely contributes to his sense that his brother Tatnall should leave the investing decisions to him.

A. A Fast-Forwarded View Of The 1970s And 1980s

Howard and Tatnall reacted to their wealth and economic security differently. After experimenting with teaching and computer programming, Tatnall decided to eschew the pursuit of a paying career. Since 1970, Tatnall has occupied his time with avocations. A devoted skier who now lives in Aspen, Tatnall has volunteered his time patrolling ski mountains in Colorado

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1DX 1 ("Trust Agreement").
2In all, there are 18 such trusts: four in the A-series; six in the B-series; three in the C-series; and five in the D-series. Tr. at 816.
3Tr. at 647-48. These figures are approximate. It is unclear whether these estimates incorporate the value of Venhill.
4See, e.g., DX 8 (Henry: "[T]he presumption that I am working to deny any beneficiary long term benefit is contradicted by history. I was the one who 'blew the whistle' on HLH in 1965 (in essence funding this debate) . . . ").
and as an instructor for disabled and blind skiers. He also continued to serve for several years in the Naval Reserves, and used his wealth to engage in philanthropic activities and non-profit board service.

Howard took a very different tack. After spending nine years at Chemical Bank, Howard decided to concentrate on making his mark as an investor and entrepreneur. One way in which he did so was to act as the key Trustee for the Family Trusts. In particular, that role involved Howard in interacting with The Hillman Company. Under the helm of Henry, Jr., The Hillman Company had become an active investor in venture capital and private equity firms as well as high-technology companies. Apparently, relations with step-brother Henry, Jr. had evolved to the point where the Family Trusts were offered the opportunity to co-invest with The Hillman Company in new deals. Howard would scrutinize these opportunities and select those that he believed had the most promise. Tatnall appears to have played little or no role in this effort, deferring to his brother's greater interest and expertise in business matters.

But that role was not satisfying for Howard. Although wealthy because of the success of The Hillman Company, Howard chafed under the secondary role of his branch of the family. Howard did not want to be dependent on Henry, Jr. Rather, he wanted to use the wealth in the Family Trusts to invest in other opportunities, and thereby reduce their dependence on The Hillman Company.

That desire manifested itself in two key ways. One is non-controversial. That involved Howard developing a relationship with Hambrecht & Quist, a West Coast investment bank that invested in technology start-ups. Eventually, Howard joined the board of that firm, which gave the Family Trusts access to deal flow from a source other than The Hillman Company. The Hambrecht & Quist relationship positioned the Family Trusts to benefit from the exponential growth in the high technology field, as that bank backed many successful technology IPOs, including Apple Computer, Genentech, Adobe Systems, and later Netscape and Amazon.com. But merely selecting deals from two quality investment shops did not satisfy Howard. He wanted to demonstrate more autonomy than that.

And that is where Auto-Trol comes into the story. In 1973, Howard Hillman used cash from the A-1 Trust to buy Auto-Trol from a venture capitalist for $50,000 and an earn-out. Candidly, the parties did not do a clear job of portraying the evolution of Auto-Trol's business over the quarter-

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5The Hillman Company was an early investor in Kleiner Perkins Caufield & Byers, the Silicon Valley powerhouse venture capital firm and Kohlberg Kravis Roberts & Co., a firm critical to the emergence of the private equity industry.
century relevant to this litigation. The most one can confidently say is that Auto-Trol has been engaged in some form of the computer software business for the last several decades, with somewhat of a focus on providing solutions for businesses to manage their operations more efficiently.\(^6\)

It appears that Howard took a hands-on role at Auto-Trol from the get-go, and served as its chairman from 1973 on. His concept for Auto-Trol was grandiose. Although Auto-Trol was a small concern, Howard's vision for it was one he explained by reference to an initiative of a much bigger firm, Xerox. Xerox had created Xerox PARC as a Silicon-Valley based research center. At that center, a number of important technology products were invented, including laser printing, Ethernet, the graphical user interface, and the mouse. Like Xerox's idea, Howard's concept was that Auto-Trol could become a "magnet investment." If Auto-Trol could establish its success with a few products, it could use those products to entice promising technological inventors to come work for it and develop even more products. These inventive ideas and minds would cross-pollinate, resulting in a sustainably profitable harvest of technology products. As one might imagine, the chronological time at which this vision came to the fore is hard to discern, but that is the basic concept Howard had.

Howard and the Auto-Trol managers appear to have convinced a number of investors that Auto-Trol had a future, including members of the Hillman family. In 1979, Auto-Trol went public. At that time, the A-1 Trust controlled a majority of the shares, but the corporation had raised capital from a number of investors with no relationship to the Hillman Family.

In 1985, Howard Hillman assumed the top managerial positions at Auto-Trol directly, becoming CEO and president. In exchange, he received an annual salary of approximately $100,000 that remained essentially unchanged until he left Auto-Trol at the end of last year. Howard's ascendancy to CEO of Auto-Trol in early 1985 roughly coincided with another development critical to this case, the formation of Venhill Limited Partnership.

B. The Family Trusts' Form Venhill Near The End Of President Reagan's First Term

By 1984, the Family Trusts were predominantly invested in The Hillman Company as well as investments directed to the Trusts by that Company and Hambrecht & Quist. The A-1 Trust also controlled Auto-Trol,

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\(^6\)In the 1960s, Auto-Trol manufactured oven sensors and in the 1970s was an early entrant in the field of computer aided design.
but had only invested a small minority of its overall portfolio.

The Family Trusts, however, did not allow for the nimble action often demanded when investment opportunities arose. The Hillman Company would contact Howard with a new opportunity, ask him to make an investing decision within 24 to 48 hours, and he would have to get consent from Tatnall and the third Trustee, who was then James Farinholt. This was inefficient, especially because Tatnall was not interested in making investment decisions, and risked the loss of valuable opportunities if Howard could not gain the necessary consents in a timely manner.

To address this problem, the Trustees of the Family Trusts formed Venhill Limited Partnership on October 22, 1984. Venhill's stated purpose was "the acquisition, ownership, investment in, and disposition of personal and/or real property of all kinds, including but not limited to providing capital to corporations, partnerships, and joint ventures . . . ." 7 The A-1 and B-1 Trusts each took positions as limited partners and contributed 49.5% each of the starting capital. Howard personally contributed 1% of the initial capital and was appointed general partner, charged with "the management and control of the Partnership and its business and affairs." 8 Venhill's creation allowed Howard a freer hand to evaluate and invest in the deal flow from The Hillman Company and improve Howard's own efforts to generate a useful private equity deal flow for the trusts as Venhill's limited partners. Like the Trustee positions in the 1968 Trusts, the Venhill general partner was uncompensated. At one point in the mid-1990s, the value of Venhill's portfolio was worth over $150 million. 9

Although Howard had a strong hand at Venhill, it is important to understand that he was not insulated from removal. Under the terms of the Venhill Limited Partnership Agreement, the limited partners could remove Howard as general partner without cause with the only consequence being the obligation to pay him the value of his 1% general partnership interest. 10 Because the limited partners were the A-1 and B-1 Trusts and those Trusts could act through a majority of their Trustees, a vote of 2/3 of the Trustees of those Trusts was sufficient to cause the Trusts to act together to remove Howard.

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7 JX 1 ("Venhill LP Agreement") Art. IV.
8 Id. § 9.1.
9 Tr. at 644-45. Complications stemming from the lack of a ready market for limited partnership interests and a change in the accounting treatment of some assets from cost to fair-market value make this more of an estimate than a value Venhill could have immediately realized in the market. Id. at 795-96.
10 Venhill LP Agreement § 15.2; Hillman v. Hillman, 910 A.2d 262 (Del. Ch. 2006).
C. Cousin Joe Steps In To Lend A Hand

In 1987, another Hillman family member enters this story. That year, Joe Hill, the cousin of Howard and Tatnall, replaced James Farinholt as the third Trustee on the A-1 and B-1 Trusts. Hill was a stockbroker in Philadelphia until he retired shortly before trial and he had invested in Auto-Trol shares at Howard's instance. When he took on the role of Trustee of the Trusts, Hill had a good relationship with both his cousins.

D. The Last Decade Of The Twentieth Century:
Auto-Trol Tanks And Howard Uses Venhill To Prop It Up

One could say that Auto-Trol was out front in the tech boom of the 1990s, in the sense that it went bust ahead of many other firms in that boom. By 1990, Auto-Trol's annual revenue peaked at $79.4 million. But its fortunes declined rapidly after that time. By 1994, Auto-Trol's auditors began requiring Howard to provide a letter to Auto-Trol "document[ing] [his] commitment of ongoing financial support to Auto-Trol ... which support will be sufficient to continue operating as a going concern." From 1994 until it "went dark" in 1997, Auto-Trol's various SEC filings contained this disclaimer:

[T]he Company [is] economically dependent on affiliates of the Company's President, Chairman of the Board, and majority shareholder ... [and] will continue to be economically dependent upon financial support from the majority shareholder until it achieves profitable operations. The shareholder has indicated his intent to continue such financial support.

Indeed, Auto-Trol's auditor required Howard to annually provide a letter documenting his commitment of ongoing financial support "to enable [Auto-Trol] to continue as a going concern through" the end of the year, which he did annually beginning in 1994 for a period ultimately lasting until December 31, 2007.

That Auto-Trol's strategy of acting as a "magnet" for a variety of technological development efforts failed was not surprising. Other, much better funded efforts along those lines had failed. At trial, Venhill and the

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11PX 29.
12DX 137; see, e.g., PX 93 at 8.
13PX 29; see DX 137; PX 34; see also PX 31; PX 32; PX 33.
plaintiff Trusts proffered the testimony of a respected academic with expertise in the area of venture capital and private equity, Professor Andrew Metrick, then of the Wharton School at the University of Pennsylvania, now of the Yale School of Management. Professor Metrick explained that: "by 1993, many large corporations . . . had given up on [the magnet concept] as being far too expensive and not getting back its returns. But those were large companies with a lot of resources. The notion that a small company . . . would be able to do that is just very, very ambitious."\(^{14}\)

When Auto-Trol began to evidence strong signs of failure, Howard reacted by deepening Venhill's investment in the firm. From 1990 to 1993, Auto-Trol's revenues fell and it was deeply unprofitable. But Howard expressed confidence — as he would continually for the next decade and a half or so — that success was just around the bend for Auto-Trol. Lacking the capacity to obtain outside financing, Auto-Trol, under Howard's dominion, began to look to Venhill as a regular provider of the cash flow it needed to keep from falling into bankruptcy.

Lacking financing, Howard began to fund Auto-Trol through loans from Venhill with a $500,000 loan on June 11, 1993 at 10% interest.\(^{15}\) This was followed by another for $400,000 on June 28, 1993 with similar terms, and yet a third on July 26, 1993 for $750,000.\(^{16}\) Howard believed at first that the loans would be temporary. But this pattern of frequent financial support for Auto-Trol would ultimately continue in this fashion, and grow to involve the provision of 186 loans over 12 years.

By the beginning of 1994, Venhill had loaned $4,650,000 to Auto-Trol, and was continuing to lend it a steady stream of capital. On February 24, 1994, Howard caused $4 million of the loans from Venhill to Auto-Trol to be converted to shares of Auto-Trol common stock at $0.75 per share. Without elimination of a substantial amount of debt, Auto-Trol's financial statements would have shown negative shareholder equity. The health of Auto-Trol's balance sheet was important because its better-financed competitors pointed customers to Auto-Trol's weak financial statements as a reason not to purchase its software. Throughout 1994, Venhill made an additional $4.6 million in loans to Auto-Trol, receiving a repayment of only $200,000, and converted another $6,413,986 of loans into equity in February and December.\(^{17}\)

Although they knew that Auto-Trol was Howard's passion and that the transactions between Auto-Trol and Venhill involved Howard acting on both

\(^{14}\)Tr. at 447.

\(^{15}\)JX-52 at 1.

\(^{16}\)Id.

\(^{17}\)JX 52.
sides of the transactions, Tatnall and Joe Hill did not initially object to these infusions of support. As of that time, Howard had been successful as Venhill's general partner in managing its investments and Auto-Trol had been unprofitable for only three years. But by 1994, Tatnall and Hill began to express concern over Howard's deepening support of Auto-Trol with Venhill funds.

In 1994, Joe travelled to Colorado to visit Auto-Trol and surveyed the company "to find out what was going on and find out if there's any collateral backing this sizable amount of investment."\(^{18}\) Howard welcomed the visit, and gave Joe access to Auto-Troll's management and facility.\(^{19}\) Joe concluded after that brief visit that he was "somewhat satisfied, but a little skeptical."\(^{20}\)

Around the same time, Howard began to express a desire to separate his family's interests from those of Tatnall's family, by having a separate set of Trustees for each side of the family. To that end, Howard proposed that he resign from his Trustee positions in the Tatnall Hillman trusts — the B-series and the D-series — and that Tatnall and Joe resign from their Trusteeship of trusts benefiting him — the A-series and the C-series.

Joe refused to resign, citing that he had "a responsibility to be sure that someone with a knowledge of fiduciary duties follow me so that all is in good hands."\(^{21}\) Tatnall similarly refused. Their principal concern was that if they resigned from the A and C-series and Howard remained, Howard would squander the funds held in trust for his children.\(^{22}\) They also feared legal exposure to the other beneficiaries of the Trusts.

1995 came and went without any satisfactory resolution of the simmering disagreements among the Trustees. By year-end, Venhill had invested almost $20 million in total in Auto-Trol, and Auto-Trol now comprised almost 20% of Venhill's portfolio.\(^{23}\) For its part, Auto-Trol's performance continued to be poor, as the company experienced declining revenues and persistent losses.

Howard proceeded without hesitation to pour Venhill funds into Auto-Trol. Joe Hill and Tatnall knew he was doing it and expressed discontent. But they did not remove him as general partner of Venhill. Joe Hill began

\(^{18}\)Tr. at 585.
\(^{19}\)Id. at 317-19; id. at 585 (Hill: "So I came back at that point somewhat satisfied, but a little skeptical, hoping that things would turn quickly.").
\(^{20}\)Id. at 585.
\(^{21}\)DX 4.
\(^{22}\)See DX 8 (letter from Howard Hillman to Tatnall Hillman, dated Sept. 10, 1995) ("From what I comprehend, your refusal to resign unless I resign from my own trusts is prompted by the belief that my children need 'protection.' What in your opinion is needed and when is there enough?'"); see also DX 11 at 2.
\(^{23}\)PX 114 ("Baines Report") at Ex. 3.
emphasizing the conflict situation that Howard was in and at one point threatened to have the Auto-Trol shares owned by the C-1 Trust voted against Howard's re-election at the Auto-Trol annual meeting in 1996.

But Joe did not act on that threat when Howard furiously objected to such a public vote of no confidence in him and Auto-Trol. At that meeting, Auto-Trol actually engaged in a ten to one reverse stock split that enabled it to convert additional Venhill debt to equity. Again, the purpose of that conversion was simple: without doing so, Auto-Trol's balance sheet would have demonstrated that it was insolvent. In the wake of that incident, Howard tried to hasten the disentanglement of the interlocking trusts by resigning from the D-1 series of trusts on February 9, 1996. Tatnall and Hill did not follow suit, and they along with Howard remained the three Trustees for the A, B, and D-series of trusts.

Inspired mostly by a desire to preserve a fragile family relationship, Tatnall and Joe continued to tolerate further investments in Auto-Trol but in an increasingly questioning and begrudging manner. By 1996, a "heavy deal flow and large expenditures" had "virtually eliminated" Venhill's liquidity, and Howard requested additional funds from the Trustees from the A-1 and B-1 Trusts as well as suggested loans from other trusts. The enormous outflow of cash to Auto-Trol without any reasonable rate of return was the major contributor to this problem. Instead of funding Venhill from contributed capital as they had before, the Trusts began to use loans to Venhill as the method of financing. The A-1 and B-1 Trusts each made their last capital contribution to Venhill on April 12, 1995. In May and November of 1996, the A-1 and B-1 Trusts began to make a series of loans to Venhill. On October 18, 1996, the Trustees met in Denver and decided to fund Venhill with loan financing through December of 1997, with $42 million in capital split between the A-1 and B-1 Trusts.

Auto-Trol showed some fleeting signs of profitability in its fourth fiscal quarter of 1997, with a profit of $117,000, which Howard made sure to convey to Tatnall. He cautioned that, "[w]hile [Auto-Trol] broke the pattern, [he did] not expect to be consistently in the black (unfortunately) from [then] on..." That was a bit of an understatement.

1997 was the last year that Auto-Trol's shares were listed on a public exchange, as the NASDAQ pulled its listing because of Auto-Trol's poor
financial condition. And, despite its profitable last quarter of 1997, by the next year, Auto-Trol had rapidly oriented itself back to its favorite red trail and showed no prospect of changing course.

By the end of the Clinton years, the relationship between Howard, on the one hand, and Tatnall and Joe, on the other, had deteriorated. The parties lawyered up, and Howard's communications with Joe were contemptuous and confrontational.

Howard continued to express a putative desire for separation of his affairs from those of his brother. Howard asked the other Trustees if the B-1 Trust wished to withdraw from Venhill. But, of course, Howard was not proposing any plan to make the B-1 Trust whole for the losses it and Venhill had suffered because of the huge infusions into Venhill. Because Venhill had not had a liquidity event from its non-Auto-Trol investments for some time and because Venhill's portfolio had become dominated by the losing Auto-Trol investment, it did not have the funds to pay off the loans from the B-1 Trust, much less to fully buy out its stake in Venhill.\(^29\)

Although Joe and Tatnall continued to procrastinate on removing Howard as Venhill's general partner, they began to restrict his discretion in other ways. On September 4, 1998, the Trustees instituted several limitations on Howard at the trust level, by tightening the previously loose style of trust administration:

You have put A-1 cash into Venhill as a loan recently ... without either one of your fellow Trustees being informed. We realize that this is a style that has had our approval in the past but the time has come due to the visible shortage of cash to clarify the Venhill funding and investment commitments policies.\(^30\)

Tatnall and Joe expressed their desire for the Trustees to obtain a 2/3 vote in favor of any new investments by Venhill requiring additional trust investment, "ideally" the approval of 2/3 of the Trustees for any A or B-series Trust expenditure in excess of $50,000 and an absolute prohibition on Howard investing C or D-series funds.\(^31\) They also commented on Auto-Trol: "We were told that Auto-Trol would be cash break-even by the end of 1997. Since then Auto-Trol has cancelled its major research project and cut back in a major way. The remaining products do not support the expense and the end of the

\(^{29}\)DX 17.
\(^{30}\)DX 19.
\(^{31}\)Id.